IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO. 42 OF 2005

Mr. Navinchandra M. Dedhia
and ors. .. Appellants

Vs.

M/s. Madhu Construction Pvt. Ltd. .. Respondent

Mr. T.N. Subramanian with Mr. Snehal K. Shah & Mr. Ramchandran N. i/by M/s. Narayan & Narayan for the appellants.

Mr. Janak Dwarkadas with Mr. Shyam Diwan with Mr. Aftaab Daimondwala with Mr. Dipesh M. Gaonkar with Ms. Snetu Patrawala i/by M/s. Divay Shah Associates for Respondent.

CORAM: B.H. MARLAPALLE, J.

Date : July 15, 2005.

P.C.:

1. Heard Mr. T.N. Subramanian with Mr. Snehal K. Shah & Mr. Ramchandran N. i/by M/s. Narayan & Narayan the learned counsel for the appellants and Mr. Janak Dwarkadas with Mr. Shyam Diwan with Mr. Aftaab Daimmdwala with Mr. Dipesh M. Gaonkar with Ms. Snetu Patrawala i/by M/s. Divay Shah Associates the learned counsel for Respondent.

2. Admit. Respondents waive service. As the appeal was ready for final hearing it has been finally heard at length and, therefore, it is being disposed off at the admission stage itself.

3. This appeal is by the plaintiffs in S.C. Suit No.4637 of 2004 filed in the Bombay City Civil Court and by the impugned order dated 28/9/2004 Notice of Motion No.3332 of 2004 has been dismissed.

4. Plot Nos. 44 and 45 bearing CTS Nos.550/6 and 550/32 and Survey Nos.127 and 115 (Part) of village Nahur, Taluka Kurla in Greater Bombay admeasuring in the aggregate 5310.50 sq.mtrs. was the developed property by the defendant. In the 16 storied building constructed by the defendant, the plaintiffs are some of the occupants as owners of the individual flats. In an open space available, purportedly with unutilised FSI, the defendant-builder started construction on the basis of the plans approved by the Municipal Corporation, for five row-houses. When the row-houses were under nconstruction, the plaintiffs approached the trial court and prayed for

declaration and injunction contending that the defendant was guilty of violating the provisions of Sections 7 and 7A of the Maharashtra Ownership Flats (Regulation of the Promotion of Construction, Sale, Management and Transfer) Act, 1963 as well as the D.C. Rules framed by the Municipal Corporation. They alleged that by undertaking the construction of the row-houses, the open space of garden and other recreational purposes came to be reduced with no parking or inadequate parking made available in contrary to the D.C. Rules and in any case once the Society was registered by the flat owners, the builder would not have proceeded with the construction unless the flat owners had given a clear consent for the same. Pending the suit, the plaintiffs moved Notice of Motion No.3332 of 2004 for temporary injunction and the prayers made in the said Notice of Motion are set out exhaustively and almost on lines with the final reliefs prayed for in the suit.

5. The learned Judge of the trial court noted that the construction undertaken of the row-houses was as per the plans sanctioned by the Municipal

Corporation, the Corporation had issued Commencement Certificate on 28/5/2004 in conformity with the conditions written in the IOD dated 6/5/2005, the Occupation Certificates were issued in respect of the flats in the 16 storied building on 9/1/1998 and there was no co-operative society registered. One of the clauses in the declaration contemplated as under :-

> "The Defendant shall be entitled to carry out further construction work in the above building, if and when any permission is obtained from the B.M.C. by utilizing increased floor space index in the above referred property by way of T.D.R. It is further agreed by the flat purchasers that they will give full cooperation to carry out any additional work without incurring any monitory expenses."

6. The trial court noted that the flat owners had given NOC in favour of the builder to go ahead with

the suit construction. The trial court also noted that the decisions of this court in the case of Ravindra Muteja vs. Bhavan Corporation reported in ALL Mah. Reporter 2003 (3) 522, Sky Anchorage Cooperative Housing Society Ltd. vs Municipal Corporation (Writ Petition No.1304 of 2004) and Smt. Neena vs. Venus Enterprises reported in 1984 (2) Bombay Cases Reporter 505 were not applicable to the facts of the present case. By assessing the arguments advanced by the respective parties and the material placed on record for prima facie consideration, the trial court held that by making the additional construction on the suit plot by the defendant no irreparable loss would be caused to the plaintiffs, more so when the said construction was as per the D.C. Rules and the plans approved by the Municipal Corporation.

7. Mr. Subramanian the learned counsel for the plaintiffs submitted that the trial court fell in error in not appreciating that the subject construction was in breach of the provisions of Sections 7 and 7A of the MOFA and Rule 23 of the D.C.

Regulations. He referred to the Commissioner's reports made consequent to the directions issued by this court in writ proceedings initiated by the appellants or some of them and submitted that the reports so placed on record and which were not available before the trial court, did show that the 16 storied building in which the plaintiffs have been allotted flats was not in conformity with the sanctions and if all the flats, as contemplated in the original sanction plan, were to be constructed, there would not remain any further FSI available with the builder for constructing the subject row-houses. As per Mr. Subramanian the trial court fell in error in appreciating the legal position as enunciated by the number of decisions of this court and which have been referred to hereinabove.

8. Mr. Janak Dwarkadas, the learned senior counsel for the defendant, on the other hand, pointed out that the plans were sanctioned by the Municipal Corporation some times in the year 1999, the suit came to be filed in the year 2004 when the construction was almost reaching the final stages and when the Notice

of Motion was heard and decided, the row-houses were ready for occupation and but for the status quo order/ad-interim order passed, the buyers/proposed occupiers could not be handed over possession of the respective row-houses. The contentions raised in the suit will have to be gone into after the parties adduced evidence and if ultimately the trial court comes to the conclusion that the construction was illegal on any count, the court has the powers to issue appropriate directions and, therefore, at this stage there is no reason to allow the Notice of Motion. Instead, the trial of the suit could be expedited and any actions or all such actions of construction leading to the five row-houses would be at the risk of the defendant. These submissions cannot be discarded and though they require considerations, it would be necessary to examine the reasoning given by the trial court.

9. The trial court believed that the society of the flat owners was not registered and, therefore, the applicability of Sections 7 or 7A of the MOFA could not be agitated by the plaintiffs. There is no

dispute that the flat owners society was registered by the Competent Authority and on the representation made by the defendant the said registration was cancelled. A revision filed before the State Government by the plaintiffs failed and, therefore, they approached this court in a writ petition which has been admitted and the orders passed by the authorities below have been stayed. This clearly shows that as on today the registration of the society exists. Secondly, the trial court held that the decisions of this court in the case of Ravindra Muteja vs. Bhavan Corporation (Supra) as well as Smt. Neena vs. Venus Enterprises (Supra) were not applicable to the facts of this case. I am at pains to point out to the learned Judge of the trial court that a legal ratio exists in the body of the judgment and not in the head notes which are the creations of the Editor of the respective Journals. Both the decisions clearly lay down the parameters regarding illegal constructions carried out in violation of the provisions of the MOFA or the D.C. Rules and those are required to be considered in the instant case on the basis that the registration of the society exists as at present. In addition, the Court

Commissioner's reports, viz. the report made by the Deputy Chief Engineer of the Municipal Corporation and Parelkar & Dallas were not available before the trial court when the Notice of Motion was dismissed in the instant case. These reports are relevant for the consideration of the Notice of Motion, provided the plaintiffs take appropriate steps to amend the pleadings. The reasoning given by the trial court in support of the impugned order is unsustainable and, therefore, the same order requires to be quashed and set aside by remanding the Notice of Motion for fresh decision and also by giving liberty to the plaintiffs to amend the pleadings and the defendant to file their amended reply/Written Statement.

10. Hence, the appeal is allowed and the impugned order dated 28-9-2004 is quashed and set aside. Notice of Motion No.3332 of 2004 is hereby restored to the file with liberty to the plaintiffs to amend the pleadings within a period of two weeks from today. The defendant may file their amended reply/Written Statement within a further period of two weeks. The Notice of Motion be heard and decided afresh on its

own merits and without being influenced by any observations made either in the impugned order or in this order, as expeditiously as possible and in any case by 31st October, 2005.

11. By way of protection, the defendant is directed to file a joint undertaking duly signed by the defendant and the intending purchasers of the row-houses to the effect that the occupation/possession of any of the row-houses shall be subject to the final outcome in the Notice of Motion and at their own risk. Undertaking be furnished within two weeks before the trial court and till then the status quo order to continue.

(B.H. Marlapalle,J.)